(3)

Supreme Court, U.S.
FILED
MAR 29 1999
OFFICE OF THE CLERK

No. 98-1308

IN THE
Supreme Court of the United States
OCTOBER TERM, 1998

CAPITAL CURRENCY EXCHANGE, N.V., doing business as Chequepoint USA, and CHEQUEPOINT WORLDCASH, INC.,
Petitioners,

v.

NATIONAL WESTMINSTER BANK PLC,
BARCLAYS BANK PLC,
HAMISH MARTIN VINCENT GRAY,
LORD ALEXANDER OF WEEDON
and JOHN MARTIN TAYLOR,
Respondents.

On Petition for a Writ of Certiorari to the
United States Court of Appeals
for the Second Circuit

PETITIONERS' REPLY MEMORANDUM

JEFFREY I. ZUCKERMAN
Counsel of Record
CURTIS, MALLET-PREVOST,
COLT & MOSLE
1801 K Street, N.W.
Suite 1205L
Washington, D.C. 20006-1301
(202) 452-7350
Counsel for Petitioners

MARCH 1999

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

bpp

IN THE

Supreme Court of the United States

OCTOBER TERM, 1998

No. 98-1308

CAPITAL CURRENCY EXCHANGE, N.V., doing business as Chequepoint USA, and CHEQUEPOINT WORLDCASH, INC.,
Petitioners,

v.

NATIONAL WESTMINSTER BANK PLC,
BARCLAYS BANK PLC,
HAMISH MARTIN VINCENT GRAY,
LORD ALEXANDER OF WEEDON
and JOHN MARTIN TAYLOR,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

---

PETITIONERS' REPLY MEMORANDUM

Petitioners Capital Currency Exchange, N.V., doing business as Chequepoint USA ("CCE"), and Chequepoint Worldcash, Inc. ("Worldcash"), respectfully submit the following reply to the Respondents' Brief in Opposition ("Br.").

1. The Respondents have largely abandoned the opinion of the Second Circuit below, and instead rely almost entirely upon *dicta* from the First Circuit's decision (by then-Chief Judge Breyer) in a non-antitrust case, *Howe v. Goldcorp Inv. Ltd.*, 946 F.2d 944 (1991), *cert. denied*,

508 U.S. 912 (1992). Quoting *Howe*, the Respondents argue (Br. 7) that because this Court's decision in *United States v. National City Lines, Inc.*, 334 U.S. 573 (1948) ("*National City Lines I*")—holding that district courts do not have the power to dismiss antitrust suits on the ground of *forum non conveniens*—came in a case involving a domestic transfer, it has no applicability to the international transfer that was ordered and affirmed by the courts below here. There are two fundamental flaws in this argument.

First, *National City Lines I* did not involve a domestic transfer—this Court explicitly observed that the district court there had not (and could not have) transferred the action, but rather had dismissed it, 334 U.S. at 591—and the case at Bar does not involve an international transfer. Indeed, while today cases can be transferred from one district to another, there is still no such thing as an international transfer. This case, for example, has not been transferred to an English court; it has been dismissed. 28 U.S.C. § 1404(a) created a limited exception to the rule of *National City Lines I*, by permitting district courts to transfer antitrust cases to another district. It did not (and could not) authorize transfers to foreign jurisdictions.

Second, the fact that *National City Lines I* involved a dismissal because another district was found to be a more convenient forum, whereas the case at Bar was dismissed because a foreign jurisdiction was found to be a more convenient forum, is a classic example of a distinction without a difference. Arguing that this is a material difference necessarily implies that although the district court in *National City Lines I* did not have the power to dismiss that action upon finding that Chicago was a more convenient forum, it could have dismissed that action had it found that London was a more convenient forum.

This is not only logically unsustainable, but it cannot be reconciled with the analysis underlying this Court's decision in *National City Lines I*. Contrary to what is suggested by the Respondents, *National City Lines I* explicitly did not rely upon the notion that the antitrust venue provision—§ 12 of the Clayton Act, 15 U.S.C. § 22—is a "special" (as opposed to a "general") venue provision. 334 U.S. at 597. Rather, this Court very carefully reviewed the history of § 12, which "enlarged the venue provision of § 7 of the Sherman Act", 334 U.S. at 579, and concluded: "To have broadened the choice of venue for the reasons which brought about that action, only to have it narrowed again by application of the vague and discretionary power comprehended by forum non conveniens, would have been incongruous, to say the least. . . . [Congress] intended trial to take place in the district specified by the statute and selected by the plaintiff." 334 U.S. at 582. This Court's analysis and conclusion in *National City Lines I* was not in any way (and cannot logically be) restricted to situations where the purportedly more convenient forum is within the United States.

2. The Respondents also argue (Br. 7) that in *United States v. National City Lines, Inc.*, 337 U.S. 78 (1948) ("*National City Lines II*"), "the Court found that [28 U.S.C. § 1404(a)] 'extend[ed] the doctrine of *forum non conveniens* to antitrust suits.'" There is no such finding in *National City Lines II*. *National City Lines II* found that § 1404(a) altered the rule of *National City Lines I* to the extent of permitting transfer of an antitrust action to a more convenient district; *National City Lines II* did not hold that the common law doctrine of *forum non conveniens* is applicable in antitrust suits.

3. The Respondents have also utterly failed to rebut the Petitioners' argument that the court of appeals erred as a matter of law in finding that England is an adequate

alternative forum.[1] As the court of appeals held below, an English court will not enforce the Sherman Act. Pet. App. 12a. It also would not have subject matter jurisdiction over the Petitioners' claims under Articles 85 and 86 of the Treaty of Rome, because the Petitioners do not (and cannot) claim any effect upon "trade between Member States" of the European Union.[2] The Respondents argue that the Petitioners have affiliates which could state claims under Articles 85 and 86, but this is irrelevant. The Petitioners are entitled to seek redress for the antitrust injury to them, regardless of whether they have affiliates that could seek redress for the injury to those affiliates pursuant to the Treaty of Rome.

As we explained in the Petition (at 16 n.7), the parties' experts agree that there would not be subject matter jurisdiction over the Petitioners' claims under the Treaty of Rome. Thus, this is a perfect example of a situation "where the alternative forum does not permit litigation of the subject matter of the dispute", and therefore "dismissal would not be appropriate." *Piper Aircraft Co. v. Reyno,* 454 U.S. 235, 254 n.22 (1981).

---

[1] Because this is a question of law, the court of appeals' decision is not entitled to any special deference by this Court. Petitioners do not seek review of any of the factual determinations by the courts below, notwithstanding that many of them are plainly erroneous, because none of those erroneous factual determinations is relevant to the purely legal issues that we are asking this Court to review. We wish to note, however, that the factual material from the Second Circuit's decision that the Respondents quote (Br. 2-3 n.1) is largely incorrect, as the Respondents well know. For example, CCE never received or sought banking services in England from Barclays or NatWest. Neither did Worldcash. In fact, neither CCE nor Worldcash has an office or does business in England. Worldcash relied upon a New York-issued letter of credit from Barclays for its money transmission license from the New York State Banking Department.

[2] The court of appeals below simply ignored this uncontroverted points of law.

4. The Respondents also insist (Br. 9) that there is "no significant conflict" between the decision of the Second Circuit below and decisions of the Fifth Circuit, notwithstanding that the Second Circuit itself "concede[d] that the Fifth Circuit has essentially accepted the argument advanced by [Petitioners]." Pet. App. 9a. The Respondents concede (Br. 9-10) that in an antitrust case, *Industrial Investment Development Corp. v. Mitsui & Co., Ltd.*, 671 F.2d 876, 890 (5th Cir. 1982), *vacated and remanded on other grounds,* 460 U.S. 1007 (1983) ("*Mitsui*"), the Fifth Circuit "cit[ed] *National City Lines I* for the broad proposition that *forum non conveniens* did not apply to antitrust suits." They insist, however (Br. 10), that two other, non-antitrust decisions by the Fifth Circuit "revisited the issue", and in some unspecified manner changed the clear holding of *Mitsui.* In fact, however, each of these non-antitrust Fifth Circuit decisions cited by the Respondents reaffirmed the rule of *Mitsui* vis-à-vis antitrust cases:

> —"In [*Mitsui*] we held that a complaint seeking relief solely under the federal antitrust laws . . . could not be dismissed under the doctrine of *forum non conveniens.*" *Kempe v. Ocean Drilling & Exploration Co.,* 876 F.2d 1138, 1142, *cert. denied,* 493 U.S. 918 (1989).
>
> —"The *National City Lines* cases, as well as [*Mitsui*], apply only in the limited context of antitrust actions. As explained in *Kempe,* there is a 'crucial point' of difference between antitrust suits and other types of cases." *Baumgart v. Fairchild Aircraft Corp.,* 981 F.2d 824, 829-30, *cert. denied,* 508 U.S. 973 (1993).

Thus, there is irreconcilable conflict between the decision of the Second Circuit below and decisions of the Fifth Circuit.

For the foregoing reasons, and for the reasons stated in the Petition for a Writ of Certiorari, we respectfully submit that the petition for a writ of certiorari should be granted.

Respectfully submitted,

JEFFREY I. ZUCKERMAN
Counsel of Record
CURTIS, MALLET-PREVOST,
COLT & MOSLE
1801 K Street, N.W.
Suite 1205L
Washington, D.C. 20006-1301
(202) 452-7350
Counsel for Petitioners

MARCH 1999